No. 80-1426

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In the

Supreme Court of the United States

OCTOBER TERM, 1980

ZEIGLER COAL COMPANY, an Illinois Corporation,
Petitioner,

v.

PHILLIP A. DETHLOFF and
DOROTHY J. DETHLOFF,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

REPLY TO BRIEF IN OPPOSITION

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There are two constitutional issues in this case. Neither concerns the substantive power of the Illinois courts to assess punitive damages against willful trespassers; both concern the unconstitutionality of the manner in which the assessment was made herein.

First, petitioner contends that the fundamental fairness guaranteed by the Fourteenth Amendment Right of Due Process was denied petitioner when the trial court held petitioner to be a willful trespasser as a matter of law without granting petitioner any opportunity to be heard on the issue. Since that finding was dispositive of peti-

tioner's liability for a three million dollar fine, the critical issue of willfulness was one on which petitioner had a Constitutional right to be heard.

Second, petitioner contends a violation of its constitutional right of fair notice through the imposition of retroactive punitive sanctions when the Illinois Courts announced a new rule of liability. The issue regarding the constitutional right of fair notice is whether a state court can constitutionally announce newly required conduct and, in the same decision, punish a litigant for its failure to comply in the past with the newly announced requirements. To do so violates the fundamental right of fair notice that underlies the constitutional guarantee of due process.

Respondents' brief in opposition makes only two contentions: first, that the constitutional issues were not timely raised, and second, that the issues reveal a lack of substantial merit on their face.

Respondents' allegation that the constitutional issues were not properly raised below is completely devoid of merit.

ARGUMENT

I. BOTH CONSTITUTIONAL ISSUES WERE TIMELY RAISED.

Respondents' contention that the procedural fairness issue was not timely raised is inconsistent with the Record in this case. Respondents allege that petitioner first raised this issue in its petition for rehearing in the Illinois Supreme Court, despite the fact that respondents were made aware of this issue when three million dollars

of the respondents' jury verdict was subtracted by the Appellate Court, precisely because of a lack of procedural fairness in the trial court. Specifically, the Illinois Appellate Court refused to tolerate the trial court's denial of petitioner's right to be heard and to introduce evidence regarding petitioner's good faith. The trial court's assumption that good faith could not be shown, and its consequent refusal to even hear petitioner on this issue, was the basis for the Appellate Court's decision to subtract, from the total jury verdict, those damages attributable to the assumed "finding" of bad faith or willfulness.

Specifically, the Illinois Appellate Court wrote:

> "The question of good faith here was a very crucial issue and—in our view—a factual determination too illusive to be decided as a matter of law. We conclude that *the trial court was unwarranted in invading the jury's domain.*" (Emphasis added.) (Cert. Pet. at 25a.)

In concluding its opinion, the Appellate Court continued and clarified its statement that petitioner had been denied the procedural fairness guaranteed by the Constitution:

> "Ziegler was entitled to have the issue of good faith submitted to the jury. Because the trial court precluded this a new trial is necessary. . . . In order to hopefully to avoid a replay of such efforts, ... [t]he bottom line is this: If plaintiffs will agree to remittitur within 28 days, in the office of the clerk of this court, the judgment will be affirmed in the amount of $1,573,455.57. Otherwise, the cause is reversed and remanded for a new trial on Count I in a manner consistent with this opinion. (Cert. Pet. at 35a-36a.)

Respondents then consented to that remittitur. The remittitur's express purpose was to erase the unfairness associated with the failure to safeguard petitioner's right to be heard on the charge of willfulness, by affording plaintiff the choice between retrying the case in a fair manner (and attempting to win the full $4.5 million) and keeping only the $1.5 million that had not been tainted by an unfair finding of willfulness, without a hearing.

Indeed, it was respondents who presented an improper issue in the Illinois Supreme Court, when they revoked their consent to the remittitur and argued that the original damage measure imposed by the trial court was proper. Petitioner then contested that claim in the Illinois Supreme Court by contending that revocation of consent to the remittitur was not possible under Illinois procedure and that argument as to the measure of damages was therefore not appropriate.

When the Illinois Supreme Court reinstated the view that had been soundly rejected by the Illinois Appellate Court, petitioner properly directed considerable argument to the issue in its petition for rehearing in the Illinois Supreme Court.

As regards the second constitutional issue, that retroactive punishment was unconstitutionally imposed for conduct that was at the time of its undertaking consistent with the then known law, respondents are equally without basis in alleging that this issue is improperly raised before this Court.

At no time whatsoever, did the trial court impose upon petitioner the obligation either to have renegotiated the lease or to have obtained a protective declaratory judgment, upon notice of the adverse claim of the respondents.

At no time whatsoever did the Illinois Appellate Court make any such suggestion. In fact, both courts directed their entire and exclusive consi ieration of duties to those duties defined by each court's interpretation of the contract documents in this case. The result of this approach was to focus the Appellate Court's opinion upon proper interpretation of the contract document.

At no time did either the Appellate Court or the trial court hold that the failure to have obtained a declaratory judgment or to have renegotiated the lease upon adverse notice, could constitute a basis for punishment.

It is not surprising, since the Illinois Supreme Court's opinions espoused a totally new burden of proving freedom from willfulness, that until that court's opinion was subjected to scrutiny on petition for rehearing, the full impact of that opinion in all future cases — forcing instigation of lawsuits by mining companies under any circumstances involving any doubt whatsoever that may be claimed by a party with interests adverse to that of the mining company — had not been demonstrated. It was also unclear until the Illinois Supreme Court's decision, that petitioner, who had until the time of the Illinois Supreme Court's decision been relieved of liability for any allegedly willful violation in this case, would be forced to pay a penalty not only as regards future failure to comply with the Illinois Supreme Court's newly announced duties, but also as regards this one instance of past failure to comply with the newly announced duty. Thus, only after the Court's announcement of the new rule and retroactive application to petitioner could the constitutional issue of retroactive punishment be raised.

Immediately upon the announcement of the new rule, which was the first opportunity to contest this rule, pe-

titioner raised the constitutional due process argument concerning unfair notice and retroactive imposition of punishment.

For respondents to now claim that petitioner has somehow neglected prior opportunities to contest the retroactive imposition of punishment is unfair at best. There had been no retroactive imposition of punishment by the Appellate Court, which had eliminated the punitive measure of damages entirely. There had been no retroactive imposition of punishment until the Illinois Supreme Court stated that mining companies in the future would have to either obtain a declaratory judgment or renegotiate leases in order to avoid the punitive measure imposed on willful trespassers. When this rule as to the future was applied to Ziegler's prior conduct in the Dethloff situation, the retroactive imposition of punishment first occurred. Since there can be no retroactive imposition of punishment for failure to comply with a newly announced duty *until* the new duty is *announced* and the punishment is *imposed,* it is absurd and unfair for respondents to argue that petitioner should have opposed retroactive punishment before the Illinois Supreme Court retroactively punished petitioner for failure to comply with the new duty.

II. PETITIONER'S CONTENTIONS ARE NOT WITHOUT SUBSTANTIAL MERIT.

Respondents totally misconstrue the constitutional argument being presented herein. At issue is not the question of whether a state court could impose the duties herein suggested. At issue is not the question of whether state courts can punish willful trespassers, as respondents argue is an issue. Respondents argue that punishment

for willful trespassers is appropriate. Petitioner does not contest that argument. At issue is not the question of whether such a rule is rational in fact or in theory.

What is at issue in the instant case is whether, having announced the new duty of going to court to obtain a declaratory judgment or of returning to the bargaining table to renegotiate a lease, the Supreme Court of Illinois can decide that that duty should be imposed retroactively in conjunction with penal sanctions for failure to comply, and whether that duty should be imposed without any fact finding hearing on willfulness. Despite respondents' brief in opposition, the three key facts remain uncontested: No fact finding hearing of any kind was allowed petitioner; the law has never required the protection of a prior declaratory judgment; the law has never found notice of the mere existence of an adverse claim (rather than knowledge of its superiority) sufficient to prove willfulness; and the Illinois Supreme Court punished petitioner's conduct without prior notice of the acts or omissions that would precipitate punishment.

CONCLUSION

Violations of the United States Constitution are always significant. In today's energy industry, the violations revealed by the Record in this cause bear a special significance. Such violations foreshadow the necessary commercial response to unfairness, in an industry where such a response cannot be afforded.

Retroactive punishment of conduct, imposed only after the conduct has been undertaken, serves no constructive deterrent function. Petitioner cannot now change that conduct. Even assuming that petitioner can be fairly ordered to compensate respondents for an alleged tort that amounts to no more than an erroneous contract interpretation, petitioner submits that fundamental fairness is certainly denied at the point that compensation ends and punishment begins. To hold otherwise is to deny petitioner the right that makes law meaningful—the right to an opportunity to conform to the law before being punished for not conforming.

In economic circumstances that emphasize planning and investment, penal sanctions for conduct that is arguably legal when undertaken, but subsequently held illegal, can only increase unnecessarily the risks of investment and destroy the certainty that is indispensable in efficient development in the mining industry.

Furthermore, to interpose this obstacle to sound decision-making, without a factual finding or an opportunity for legal argument, is to abdicate entirely the judicial responsibility to afford those procedural guarantees that

ensure the rationality of legal decision-making, that guard against arbitrary and capricious conduct, and that foster a proper respect for a system built on fairness. To redress the constitutional violations that have occurred in the instant case, petitioner respectfully urges this Court to grant the Writ requested herein.

Respectfully submitted,

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